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**UAW-DaimlerChrysler National Training Center and
Local 512, Office and Professional Employees
International Union, AFL-CIO. Case 7-CA-
46187**

March 9, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On December 4, 2003, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, UAW-DaimlerChrysler National Training Center, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) On request, meet and bargain collectively and in good faith with the Union as the exclusive bargaining representative of the unit. The unit is:

All full-time and regular part-time maintenance employees, secretarial employees, clerical employees, mailroom employees, and janitorial employees employed by Respondent at its facility located at 2211 East Jefferson, Detroit, Michigan, but excluding guards and supervisors as defined in the Act."

2. Insert the following as paragraph 2(d) and reletter the subsequence paragraphs.

"(d) Within 14 days of this Order, remove from its files any reference to the unlawful, unilateral layoff of Glenn "Alex" Winnie and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful layoff will not be used against him in any way."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 9, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit or protection

Choose not to engage in any of these protected activities.

WE WILL NOT implement changes regarding the wages, hours, and other terms and conditions of employment of the bargaining unit, including layoffs, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to its conduct and its effects on the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, on request, meet and bargain collectively and in good faith with the Union as the exclusive bargaining representative of the unit. The unit is:

All full-time and regular part-time maintenance employees, secretarial employees, clerical employees, mailroom employees, and janitorial employees employed by us at our facility located at 2211 East Jefferson, Detroit, Michigan, but excluding guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Glenn "Alex" Winnie full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his

seniority or any other rights or privileges previously enjoyed.

WE WILL make Glenn "Alex" Winnie whole for any loss of earnings and other benefits resulting from his unilateral layoff, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful, unilateral layoff of Glenn "Alex" Winnie and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful layoff will not be used against him in any way.

UAW-DAIMLERCHRYSLER NATIONAL TRAINING CENTER

Judith A. Schulz, Esq., for the General Counsel.

Jerome Hill, Esq., of Detroit, Michigan, for the Respondent.

John Strachan, of Lansing, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on October 1, 2003. The charge was filed on April 30 and the complaint was issued on June 30, 2003.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, UAW-DaimlerChrysler National Training Center (NTC), is a corporation operated jointly by the United Auto Workers International Union (UAW) and the DaimlerChrysler Corporation. Jim Davis, representing the UAW, and Frank Slaughter, representing DaimlerChrysler, are codirectors of the NTC. Respondent provides education and training for DaimlerChrysler employees who are represented by the UAW at its facility in Detroit, Michigan. Respondent annually derives revenues in excess of \$500,000. NTC receives revenues in excess of \$50,000 from the performance of services for employees located outside the State of Michigan. NTC admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 512, Office and Professional Employees International Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent NTC violated Section 8(a)(5) and (1) of the Act in permanently laying off Glenn "Alex" Winnie on April 11, 2003, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent regarding the layoff and its effects on the bargaining unit.

The Union has represented certain employees at the NTC since 1994. These employees were in a bargaining unit consisting of all regular full-time secretarial, clerical, mailroom, and janitorial employees. NTC and the Union entered into a collec-

tive-bargaining agreement in 2001 covering these employees that expires in November 2004. After this agreement was signed, the Board conducted a representation election and, on December 13, 2001, certified that the Union could bargain for NTC's maintenance employees as part of the existing collective-bargaining unit. As of the date of certification there were three maintenance employees in the unit.

In March 2002, Dave Smith, the maintenance supervisor, approached Glenn "Alex" Winnie, the maintenance employee with the least seniority. Smith told Winnie that he learned that Winnie and the other two maintenance employees could not work on the building's heating and cooling units without a license, as they had been doing for several years. Prior to March 2002, Smith and Winnie had apparently been under the impression that the NTC maintenance employees could perform such work under Smith's license. After this conversation, the work Winnie and other maintenance employees performed was restricted to such tasks as painting, maintenance work on desks and carpets, minor plumbing, and changing light bulbs.

The first bargaining session regarding a contract for the maintenance employees occurred on July 30, 2002. The union negotiating team consisted of John Strachan, the Union's president and executive director; Anthony Martinez, a clerical employee who is the chief union steward and Alex Winnie. At this meeting a joint-employer/union committee was formed to research the license issue. In October 2002, the committee met with city of Detroit inspectors and on the basis of that meeting concluded that an employee was required to have a license to perform the heating and cooling work. On November 21, 2002, John Strachan sent a letter to Respondent's negotiators, Gil Wojcik and Lisa Reinhardt-Kosal. In this letter Strachan proposed that the three maintenance employees be included in the collective-bargaining agreement covering the rest of the employees represented by the Union at NTC.

The second negotiating session did not occur until February 18, 2003. During this meeting, Gil Wojcik, one of Respondent's negotiators, stated that DaimlerChrysler was losing money and was laying off employees. He then said that Respondent was either considering or had considered layoffs. He made no specific comments regarding which employees might be laid off. After that meeting, the Union again proposed that maintenance employees be covered by the existing collective-bargaining agreement. That contract contains the following provision:

The Center and the Union each agree only to require collective bargaining with respect to any subject matter specifically required to be bargained by the terms of this Agreement, all other matters not addressed specifically in this Agreement are reserved to the Center's right to manage and operate as referenced in article 1, section 4.

In article 1, section 4, of the collective-bargaining agreement, NTC retains the right to lay off employees. Article 9 of the contract provides that the principle of seniority will govern layoffs.

On March 28, 2003, Respondent's human resources manager, Ray Britnell, informed Alex Winnie verbally and in writing that, "You will be placed on layoff status effective at the end of your regular shift on April 11, 2003." Britnell also informed the Union's chief steward, Anthony Martinez, of the layoff on March 28. Martinez did not ask Britnell for the op-

portunity to bargain about the layoff or its effects. However, he immediately called Union President John Strachan.

Strachan called Jim Davis, the UAW codirector of the NTC. Strachan's uncontradicted account of the conversation is as follows:

I told Jimmie that I had just found out that they were laying him [Winnie] off, and I said, Jimmie you can't do that, and he said, yes, I can, I've checked with our counsel and I've been told that we can do that. I said Jimmie, you're going to end up paying this man to sit home, and he said, well, he'd rather do that than pay him to change light bulbs. So I said, Jim, you know, he can do more work than that, and he said, look it's a done deal, there's nothing to talk about, I can't help you, and with that, I knew that, if Jimmie wasn't going to help me, I wasn't going to get any help from the employer. [Tr. 27.]

Davis is not a member of the NTC team negotiating with the Union.¹ However, given Strachan's uncontradicted account of this conversation, I find that Strachan would reasonably believe that Davis was reflecting Respondent's position and that he was speaking and acting for management. Thus, I conclude that Davis, when speaking with Strachan, was NTC's agent. *Community Cash Stores*, 238 NLRB 265 (1978).²

Neither Strachan nor anyone else from the Union discussed Winnie's layoff with Frank Slaughter, the other codirector, any members of the NTC contract negotiations team, or other representatives of Respondent between March 28 and April 11. The Union also did not raise the Winnie layoff at the third bargaining session on April 28. Two days later, however, it filed an unfair labor practice charge alleging that the layoff was illegal due to its unilateral nature and because Winnie was laid off in retaliation for his union activities. The complaint was issued only on the basis of Respondent's alleged failure to give the Union an opportunity to bargain over the layoff. As of the date of the instant hearing, October 1, 2003, the parties had yet to reach agreement on a collective-bargaining agreement covering the maintenance employees.

Analysis

Respondent's decision to lay off Alex Winnie for economic reasons is a mandatory subject of bargaining. Consequently, NTC was required to provide notice to the Union and an opportunity to bargain concerning the decision to lay off this employee and the effects of that decision. *Holmes & Narver*, 309 NLRB 146 (1992).

Respondent argues that it provided sufficient notice to the Union and an opportunity to bargain. However, NTC submits that the Union waived its right to bargain over the layoff. For the following reasons, I find that the Union did not waive its bargaining rights.

To be effective, a waiver of statutory bargaining rights must be clear and unmistakable. Waiver can occur in any of three ways; by express provision in a collective-bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. In a case where the parties have not yet concluded their first collective-bargaining agreement, the Board decides

the waiver issue solely on the evidence of the parties' conduct. *American Diamond Tool*, 306 NLRB 570 (1992).

An employer cannot implement a change and then claim that a union waived its right to bargain by failing to do so retroactively. *Intersystems Design Corp.*, 278 NLRB 759 (1986). "To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain." *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982). Respondent gave the Union 2 weeks' notice before implementing the layoff of Winnie. As did the Board in *Gibbs & Cox, Inc.*, 292 NLRB 757 (1989), I find that this was sufficient to allow the union a reasonable opportunity to request bargaining.

Union President Strachan concedes that he did not request the opportunity to bargain about the layoff when he talked to Codirector Jim Davis. He also concedes that he didn't request bargaining over the Winnie layoff from any other management representative. However, I conclude that Strachan did not waive the Union's bargaining rights due to the nature of his conversation with Davis.

Fait Accompli

The General Counsel argues that Respondent, by Jim Davis, presented the Union with a fait accompli on March 28, and therefore the Union's failure to request bargaining afterwards does not constitute a waiver of its bargaining rights. The issues of "fait accompli," "request to bargain," and "waiver" are related in the sense that a finding of fait accompli will prevent a finding that a failure to request bargaining is a waiver. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024 (2001).

The fact that 2 weeks passed between the time that the Union learned of the layoff and the effective date of the layoff is not necessarily dispositive as to whether the Union's failure to request bargaining waived its statutory rights to do so. The announcement of a unilateral change may constitute a fait accompli that will not extinguish a union's bargaining rights even when the change is to be effectuated several weeks in the future. An employer must at least inform the union of its proposed actions under circumstances that afford a reasonable opportunity for counterarguments or proposals. See *Pontiac Osteopathic Hospital*, supra.

The critical matter in this case is Union President Strachan's conversation with Respondent's codirector, Jim Davis. Davis informed Strachan that he knew about the layoff and implied that he had a role in this decision by telling Strachan that he had checked with Respondent's counsel as to the legality of the layoff. Davis then told Strachan that the layoff was a "done deal," that there was nothing to talk about and that Davis couldn't help Strachan regarding the layoff.

In this context, it was reasonable for Strachan to conclude that if UAW Codirector Davis regarded the layoff as a done deal that there was no point in requesting bargaining from Slaughter, the DaimlerChrysler codirector, or management officials subordinate to Davis. I therefore find that Strachan's failure to request bargaining was excusable and was not tantamount to a license for Respondent to make the unilateral change. *Pontiac Osteopathic Hospital*, supra at 1024 fn. 2 (Former Chairman Hurtgen's view).

The instant matter is distinguishable from the cases relied on by Respondent: *America Diamond Tool*, supra, and *Hartmann Luggage Co.*, 173 NLRB 1254, 1255 (1968). In both of these cases, the Board found that the union had waived its bargaining

¹ Employer representatives at the February 18, 2003 bargaining session were Gil Wojcik, Lisa Reinhardt-Kosal, Human Resources Manager Ray Britnell, Attorney Jerome Hill, and James Palmer.

² Davis did not testify in this proceeding.

rights. It did so in part because in contract negotiations the unions had proposed giving management the right to effect layoffs without their consent. However, in neither of these cases did the Union take the affirmative step, after making such proposals, to protest the employer's unilateral layoff. I conclude that Strachan's telephone call to Davis, protesting Winnie's layoff, preserved the Union's bargaining rights.

In the absence of the Union's negotiating position at the February bargaining session, Jim Davis would clearly be deemed to have presented Strachan with a fait accompli regarding the layoff. I conclude that no contrary result should be reached due to the Union's collective-bargaining proposals, which were never accepted by Respondent.

Since Respondent, by Jim Davis, presented the Union with a fait accompli, the Union did not waive its statutory bargaining rights. Thus, Respondent violated Section 8(a)(5) in laying off Glenn "Alex" Winnie on April 11, 2003, without affording the Union an opportunity to bargain over this personnel action.

CONCLUSION OF LAW

Respondent violated Section 8(a)(5) and (1) by permanently laying off Glenn "Alex" Winnie on April 11, 2003.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully laid off an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, UAW-DaimlerChrysler National Training Center, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing changes regarding the wages, hours, and other terms and conditions of employment of the bargaining unit, including layoffs, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to its conduct and its effects on the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain collectively and in good faith with the Union as the exclusive bargaining representative of the unit.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days from the date of this Order, offer Glenn "Alex" Winnie full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Glenn "Alex" Winnie whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral layoff in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Detroit, Michigan, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 28, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 4, 2003.

APPENDIX

NOTICE TO EMPLOYEES

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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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Act together with other employees for your benefit or protection

Choose not to engage in any of these protected activities.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT Implement changes regarding the wages, hours, and other terms and conditions of employment of the bargaining unit, including layoffs, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to its conduct and its effects on the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Glenn "Alex" Winnie full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Glenn "Alex" Winnie whole for any loss of earnings and other benefits resulting from his unilateral layoff, less any net interim earnings, plus interest.

UAW-DAIMLERCHRYSLER NATIONAL TRAINING CENTER